who had concurred in the prevailing opinion in the *Dick* case. A detailed judicial history of the dissenting justices in the principal case upon price-maintenance and like questions, by Mr. Edward S. ROGERS, may be found in 10 MICH. LAW REV. 608.

It was generally thought that in the *Dick* case the Supreme Court had expressly committed itself to the doctrine that the patentee could require the user to comply with any conditions which he might choose to impose. But that case is attempted to be distinguished from the principal case upon the ground that in the former there was a qualified sale for less than value for limited use with other articles only. But this distinction does not seem very clear, sound or convincing, but appears to be an evasion of the real question. The test laid down as to whether or not a sale may be qualified is, has the vendor any further interest in the articles? Now why could not the limitation have been upheld in the principal case? For it is conceded by all that one of the best and most effective ways to establish a reputation and market for goods is to have a uniform price for these goods throughout the country. To say the least these two decisions are conflicting in spirit.

There does not seem to be any valid reason why the patentee should have broader rights with regard to imposing limitations upon the right to use than he should have with regard to imposing limitations upon the right to vend. The decision in the principal case is based upon *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. 722, which arose under the Copyright Act. By analogy it was determined that the words, "Exclusive right to vend" found in the patent statute should have the same interpretation as the words "sole liberty of vending" found in the Copyright Act. As by statute the patentee is given broader rights than the owner of a copyright, it is difficult to see how the same construction is to be put upon these words. It is true that the rights to use and vend are separate and distinct but it does not seem that Congress ever intended to place different limitations upon the extent of the monopoly a patentee should have, as to these rights.

Since this decision some manufacturers have changed their methods of attempting to control the price the ultimate consumer is to pay and are now operating under agency contracts with retailers, and still others under a system by which the article is leased. The tendency of the Supreme Court seems to be to take the view that the monopoly enjoyed by the patentee was not meant by Congress to be without limitation, and consequently to make it practically impossible for the patentee to control the retail price. G. E. K.

THE EFFECT UPON A BILL OF EXCHANGE, OF A REFERENCE TO ATTACHED BILLS OF LADING.—A recent case in the New York Court of Appeals presents an interesting discussion of the principles involved in the determination of this question, and shows the correct application of the same.

A firm of cotton dealers in Decatur, Ala., drew a draft for $39,000.00 upon the plaintiffs, cotton brokers in New York, attaching thereto bills of lading for 600 bales of cotton. The only reference in the draft to the bills of lading was the word "cotton" lithographed or printed upon the draft. This

draft was discounted by a bank in Decatur, indorsed over to defendants, bankers in New York City, who took bona fide and presented to the plaintiffs, the drawees, who accepted and paid same. Subsequently the bills of lading were discovered to be forgeries, but this was unknown to any of the parties except the drawers. In this suit the drawees seek to recover back the money paid the defendants, and urge four theories to sustain their claim; 1. That the defendants guaranteed the genuineness of the bills of lading; 2. That the word "cotton" in the draft made it conditional on the genuineness of the bills of lading; 3. That the plaintiffs made payment relying upon the genuineness of the bills of lading, and hence their payment was made under a mistake of fact; 4. That defendants or their transferor caused the mistake of fact. The court held that the plaintiffs could not recover because the defendants were bona fide indorsers of the draft and the bills of lading were no part of it. *Springs et al.* v. *Hanover National Bank of City of N. Y.* (N. Y. 1913), 103 N. E. 156.

The court considers only the second and third of the four theories advanced by the plaintiffs, and to the third devotes the greater part of its opinion. In support of its holding that, though the draft was paid under a mistake of fact (which usually entitles one to recover back the money paid) yet the plaintiffs cannot recover back the money, the court quotes from the opinion of Judge COOLEY in the case of *First National Bank of Detroit* v. *Burkham,* 32 Mich. 328. The same question was involved there as in the present case, and part of the quotation is as follows: "If the mistake regarding the security will authorize the drawees to recall the payment made to the payee, no reason is perceived why a mistake regarding the responsibility of the drawer or regarding his honesty or integrity, or anything else upon which they relied for protection in their dealings, should not justify the like action. * * * But we think it would be an exceedingly unsafe doctrine in commercial law, that one who had discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterwards hold the money subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment." On this point then the above case seems conclusive, on reason at least, and the instant case being one of first impression in New York, the court stated its reluctance to disagree with the learned judge in the Michigan case as well as the like case of *Hoffman & Co.* v. *Bank of Milwaukee,* 79 U. S. (12 Wall.) 181, and *Goetz* v. *Bank of Kansas City,* 119 U. S. 551, even if it doubted the wisdom of the principle upon which they were based, which it did not, but entirely concurred with.

The reason of the rule is clear, for the drawee by accepting becomes primarily liable just as the maker of the note by the making becomes the party primarily liable; his engagement runs not only to each of the indorsees but to the drawer himself. *Heurtematte* v. *Morris,* 101 N. Y. 63. Prima facie the acceptance imports that funds of the drawer are in the hands of the drawee and is an appropriation of the funds to the payment of the draft. But if the drawer has no funds in the hands of the acceptor, the acceptor, in fact, pays the debt of the drawer, but as between himself and the payee, it

is not a collateral but a direct and original undertaking, *Raborg* v. *Peyton*, 2 Wheat. 385. He cannot as against a bona fide holder dispute the genuineness of the signature of the drawer, *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *Northwestern National Bank* v. *Bank of Commerce*, 107 Mo. 402, 15 L. R. A. 102; or the existence of the drawer, *Cooper* v. *Meyer*, 10 B. & C. 468; hence why, if not allowed to recover back money paid on the mistaken belief as to the genuineness of the signature of the drawer or as to his existence, should he be allowed to recover back money paid on a mistaken belief as to the genuineness of the security of the drawer?

The principle of the instant case is supported by the decisions of many other courts; in addition to the cases cited in the principal case, see *Hall* v. *Keller*, 64 Kan. 211, 62 L. R. A. 758, 91 Am. St. R. 209; and *Tolerton* v. *Anglo-California Bank*, 112 Ia. 706, 50 L. R. A. 777. In the former case the consignors of grain drew drafts upon the consignees for the price of same, and attaching the bills of lading for the grain to the drafts had them discounted by banks, which in turn presented the drafts for acceptance and payment and received the amount thereof. Afterwards it was discovered that the drawers had no titile to the grain shipped, and the consignees or acceptors sued the indorsers to recover back the money paid on the drafts. The *Tolerton* case presented a very similar situation.

But in both cases the courts refused a recovery on the ground that the indorsers were bona fide holders for value of the drafts and not affected by any want or failure of consideration between the drawers and drawees, the latter by their acceptance becoming primarily liable on the instrument, and after the payment of same not entitled to recover back the money from the bona fide holder.

These two cases as well as the instant case and cases cited therein are opposed by the cases of *Landa* v. *Lattin*, 19 Tex. Civ. App. 246, and *Finch* v. *Gregg*, 126 N. C. 176, 49 L. R. A. 679. In the first of these cases the consignees of the grain and the drawees of the draft had paid the amount of the draft to the payee, before an inspection of the grain was made. Afterwards discovering the inferior quality of the grain shipped, the consignors brought an action against the payee for the difference between the value of the goods in their damaged condition and the price paid. The court allowed a recovery upon the ground that the assignee of the bills of lading and the payee and indorsee of the draft stood in the shoes of the consignor, was the owner of the grain, and therefore liable for the damage suffered by the consignee because of the defective quality of the goods. The North Carolina case involves the same question and applies the same principle. But in both of these cases the courts overlooked and disregarded the principle of law really involved in them, and announced by the principal case, i. e., if a negotiable draft has been accepted or paid (or both) while in the hands of one who is a bona fide holder for value, and it later transpires that there is a total or partial failure of the consideration for the acceptance or payment, the acceptor, if he has not paid, is nevertheless liable to make payment, and, if he has paid, cannot recover back the money paid, notwithstanding the failure of consideration.

Therefore these two cases were decided on the wrong grounds. See note to *Finch* v. *Gregg,* supra, in 50 L. R. A. 679.

On the second theory advanced by the plaintiff to sustain its claim to a right of recovery, the court holds that the fact that the word "cotton" appears printed in the draft does not contain reference to the bills of lading attached thereto, so as to make plaintiffs' acceptance of the former conditional upon the genuineness of the latter, but that this word was evidently used for the purpose of advertising or characterizing the business in which the drawers were engaged. The conclusion of the court on this point is also correct. The Negotiable Instruments Act provides that an order is unconditional, though coupled with a statement of the transaction which gave rise to the instrument. BUNKER'S, NEG. INSTR., § 5. Hence under the statute law of New York, though the transaction giving rise to the instrument be stated therein the order would be none the less unconditional.

This rule of the Negotiable Instruments Act obtained at the Law Merchant as is well illustrated by the cases of *Preston* v. *Whitney,* 23 Mich. 260; *Siegel* v. *Chicago Trust & Savings Bank,* 131 Ill. 569; *Wells* v. *Brigham,* 6 Cush. (Mass.) 6; *Hereth* v. *Meyer,* 33 Ind. 511. In the *Siegel* case, supra, the action was on a note which recited, "On July 1, 1887, we promise to pay, etc., for the privilege of one framed advertising sign, etc." It was contended that this recital made the promise of payment conditional on the performance of an executory contract by the promisee. But the court held that the mere statement of the consideration or transaction in the instrument did not make the instrument conditional thereon, and that a bona fide holder is not affected by any failure of consideration as between the original parties.

The instant case is then decisive of this question of how far a bona fide holder is affected by the forgery of bills of lading attached to the drafts paid to him by the drawee, and if its decision were otherwise than it is, it would, as is observed by the author of the note to *Finch* v. *Gregg,* in 50 L. R. A. 679, "cause a revolution in commercial circles." J. S. K.

STERILIZATION OF CRIMINALS OR DEFECTIVES.—During the past few years there have been enacted many statutes, the express purpose of which has been the betterment of society. Among this class of statutes are those in California (Stat. 1909, p. 1093, c. 720), Connecticut (Pub. Laws 1909, c. 209), Indiana (Laws 1907, c. 215), Iowa (Laws 1911, c. 129), Michigan (Pub. Acts 1913, No. 34), New Jersey (Pub. Laws 1911, p. 353, c. 190), New York (c. 445, N. Y. Laws 1911), and Washington (See 2287, Rem. and Bal. Code), providing for the sterilization of criminals and defectives. With respect to such legislation the most important question is that of constitutionality. Although in but two of the above states, has the constitutional question been raised, it is nevertheless fitting to comment on such legislation in view of the fact that the only decisions we have upon the subject are seemingly in conflict.

The most recent case upon the subject is *Smith* v. *Board of Examiners of Feeble-minded,* 88 Atl. 96 (N. J.). The prosecutrix, since 1902, had been an